A

Ong Soo Keok & Ors v Ong Soo Kwee (suing as executor of the estate of Loh Ah Moy @ Loh Siew Keng (P))

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-478–03 OF 2014
DAVID WONG, VARGHESE GEORGE AND NALLINI PATHMANATHAN JJCA
C 11 MARCH 2015

Probate and Administration — Administration — Administration action — Action for relief from personal liability — Application for exoneration under provisions of will — Protection against personal liability — Whether executor and trustees of estate acted in accordance with provisions and spirit of will — Whether application of trustees and executor for relief ought to be entertained or refused — Trustees Act 1949

D

E This action was brought by an executor and the trustees of the estate of Loh Ah Moy @ Loh Siew Keng ('the appellants'), seeking relief from personal liability in respect of certain transactions, which they had undertaken. The appellants sought to be exonerated under the provisions of the will of the late Loh Ah Moy or, alternatively, sought protection against personal liability under s 63 of the Trustees Act 1949 ('the Act'). The High Court dismissed the appellants' F application, refusing such relief on the grounds that the appellants had not acted in accordance with the provisions and spirit of the will and could not, on a consideration of the entirety of the facts and circumstances of the case, be said to have acted honestly and reasonably. Hence, the present appeal. The primary issue that arose for the court's consideration was whether, under the G circumstances of this particular case, the application of the trustees and the executor for relief ought in fact to have been entertained, or whether the application had been correctly refused. This required a consideration of the construction to be afforded to s 63 of the Act, more particularly in the context of the provisions of the will of Loh Ah Moy @ Loh Siew Keng, the acts and/or H omissions of the trustees, and on the basis of accepted legal authorities.

Held, allowing the appeal:

I (1) The appellants had acted honestly and reasonably, thereby availing the appellants of the protection afforded under s 63 of the Act. The appellants had satisfied the burden imposed by s 63 of the Act. They had acted honestly and reasonably, in that they sought directions from, and acted pursuant to orders of court. As such, the impugned acts were not acts that were carried out covertly or with stealth. There were no elements

of dishonesty in their conduct. In fact, what they did was in the interests of the estate and its beneficiaries, although it went against the spirit of the will (see paras 4 & 40).

(2) The court allowed the appeal and set aside the orders of the High Court judge. The prayers sought for in the application filed by the appellants for relief under s 63 of the Trustees Act 1949. Parties were directed to draft an order, which dealt with all consequential matters, including the issue of costs. On the adjourned date, after adjudication on the issue of costs, a consent order was entered on terms as agreed between the parties as a consequence of our decision on 18 September 2014. The grant or withholding of relief under s 63 is entirely a matter of judicial discretion, which discretion is to be exercised after full consideration has been accorded to whether a trustee acted both honestly and reasonably, within the context or factual matrix of each individual case (see paras 40, 46 & 66).

(3) The court has to assess whether the trustee ought fairly to be excused. No general principle or rule, far less, a subjective or objective test, comprises a part of the exercise of such judicial discretion. To this extent therefore, it would appear that each case is governed by its own particular circumstances and no subjective or objective test ought to be imposed upon the court by way of a rule, in the exercise of the judicial discretion accorded by that section. For these reasons, the court disagreed with the conclusion of the judge that an objective test should be utilised in applying s 63 of the Act (see para 46).

(4) The question of whether the appellants had acted 'honestly' or 'dishonestly' and the appropriate standard or test to be applied in determining this issue were more properly relevant to the preceding application to set aside the sanction of the court procured for the proposed sale of the said property. This is because the issue of whether the proposed sale amounted to a breach of trust, and the nature of such breach, namely whether it involved elements of 'dishonesty' or 'mala fides', ought properly to have been dealt with at that juncture. This would have had the effect of classifying the breach as either a 'technical' breach of trust, or one premised on 'negligence' or 'dishonesty' (see para 57).

[Bahasa Malaysia summary

Tindakan ini telah dimulakan oleh wasi dan pemegang amanah harta pusaka Loh Ah Moy @ Loh Siew Keng ('perayu-perayu'), memohon relief daripada liabiliti peribadi berkaitan transaksi tertentu, yang telah dilaksanakan oleh mereka. Perayu-perayu telah memohon untuk dilepaskan di bawah peruntukan-peruntukan wasiat mendiang Loh Ah Moy atau, secara alternatif, memohon perlindungan terhadap liabiliti peribadi di bawah s 63 Akta Pemegang Amanah 1949 ('Akta tersebut'). Mahkamah Tinggi telah menolak

permohonan perayu-perayu, menolak relief tersebut atas alasan bahawa perayu-perayu tidak bertindak menurut peruntukan dan niat wasiat itu dan tidak boleh, atas pertimbangan keseluruhan fakta dan keadaan kes, dikatakan telah bertindak secara jujur dan munasabah. Justeru, rayuan ini. Isu utama yang timbul untuk pertimbangan mahkamah adalah sama ada, di bawah keadaan kes tertentu ini, permohonan pemegang amanah dan wasi untuk relief patut pada hakikatnya dilayan, atau sama ada permohonan itu telah ditolak dengan wajar. Ini memerlukan pertimbangan berhubung penggubalan yang diberi kepada s 63 Akta tersebut, lebih khusus dalam konteks peruntukan wasiat Loh Ah Moy @ Loh Siew Keng, tindakan dan/atau peninggalan pemegang amanah, dan atas asas autoriti sah yang diterima.

Diputuskan, membenarkan rayuan:

(1) Perayu-perayu telah bertindak secara jujur dan munasabah, dengan itu membolehkan perayu-perayu mendapat perlindungan yang diberikan di bawah s 63 Akta tersebut. Perayu-perayu telah memenuhi beban yang dikenakan oleh s 63 Akta tersebut. Mereka telah bertindak secara jujur dan munasabah, di mana mereka memohon arahan daripada, dan bertindak menurut perintah-perintah mahkamah. Oleh itu, tindakan-tindakan yang dipersoalkan bukan tindakan-tindakan yang dilaksanakan secara terselindung atau senyap. Tiada elemen ketidakjujuran dalam perlakuan mereka. Bahkan, apa yang dilakukan oleh mereka adalah demi kepentingan harta pusaka dan benefisiarinya, meskipun ia adalah bertentangan dengan niat wasiat itu (lihat perenggan 4 & 40).

(2) Mahkamah membenarkan rayuan dan mengetepikan perintah hakim Mahkamah Tinggi. Permohonan yang dipohon dalam permohonan yang difailkan oleh perayu-perayu untuk relief di bawah s 63 Akta Pemegang Amanah 1949. Pihak-pihak diarahkan untuk menderaf perintah, yang membincangkan semua perkara berbangkit, termasuk isu kos. Pada tarikh yang ditangguhkan, selepas pengadilan berhubung isu kos, perintah persetujuan telah dimasuki atas terma-terma sepertimana dipersetujui antara pihak-pihak sebagai akibat daripada keputusan mahkamah pada 18 September 2014. Pemberian atau penahanan relief di bawah s 63 adalah keseluruhannya perkara berhubung budi bicara kehakiman, yang mana budi bicara dilaksanakan selepas pertimbangan sepenuhnya dibuat kepada sama ada pemegang amanah telah bertindak secara jujur dan munsabah. Dalam konteks atau matriks faktual setiap kes individu (lihat perenggan 40, 46 & 66).

(3) Mahkamah perlu menaksir sama ada pemegang amanah patut dengan adil dikecualikan. Tiada prinsip atau rukun am, sekurang-kurangnya, ujian subjektif atau objectif, yang terdiri daripada sebahagian daripada pelaksanaan budi bicara kehakiman sebegitu. Setakat ini, ia kelihatan

bahawa setiap kes dikawal oleh keadaan tertentunya yang sendiri dan tiada ujian subjektif atau objektif patut dikenakan ke atas mahkamah melalui suatu peraturan, dalam pelaksanaan budi bicara kehakiman yang diberikan oleh seksyen tersebut. Untuk sebab-sebab itu, mahkamah tidak bersetuju dengan kesimpulan hakim bahawa ujian objektif patut digunakan dalam mengguna pakai s 63 Akta tersebut (lihat perenggan 46).

(4) Persoalan sama ada perayu-perayu telah bertindak *honestly* atau *dishonestly* dan piawai sesuai atau ujian yang terpakai dalam menentukan isu ini adalah sepatutnya lebih relevan kepada permohonan terdahulu untuk mengetepikan sanksi mahkamah yang diperoleh untuk cadangan jualan hartanah tersebut. Ini adalah kerana isu sama ada cadangan jualan itu membentuk pelanggaran amanah, dan sifat pelanggaran sedemikian', iaitu sama ada ia melibatkan elemen-elemen *dishonesty* atau *mala fides*, sepatutnya patut dikendalikan di peringkat ini. Ini akan memberi kesan mengklasifikasikan pelanggaran itu sama ada sebagai pelanggaran amanah yang *technical*, atau suatu yang berpremis atas *negligence* atau *dishonesty* (lihat perenggan 57).]

Notes

For cases on administration action, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 1819–1820.

Cases referred to

Ch'ng Joo Tuan Neoh (F) and Khoo Ee Lay (substituted by Order of Court dated 29-2-32) v Khoo Tek Keong & Others [1932] 1 MLJ 141, CA (refd)
In re Grindey Clews v Grindey [1898] 2 Ch 593, CA (refd)
In re Kay Mosley v Kay [1897] 2 Ch 518, CA (refd)
Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals [2013] 2 MLJ 174, CA (refd)
Perrins v Bellamy [1898] 2 Ch 521, Ch D at p 527 (refd)
Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others [1998] SGCA 35, CA (refd)
Whittaker v Bamford; Re Allsop [1914] 1 Ch 1, CA (refd)
Evans (deceased); Evans v Westcombe Re [1999] 2 All ER 777, HC (refd)
Haji Ali bin Haji Mohamed Noor Deceased Habsah Binte Ngasirah (W) & Anor v Mohamed Zain bin Haji Ali & Ors Re [1933] 2 MLJ 135 (refd)
Royal Brunei Airlines v Tan Kok Ming Philip [1995] 3 MLJ 74, PC (folld)

Legislation referred to

English Trustee Act 1925 s 61
Judicial Trustees Act 1896 s 3
Trustees Act 1949 s 63
Trustees Act 1963 s 63

Trustees Ordinance 1929 (repealed by the Trustees Act 1949) s 60

Appeal from: Originating Summons No 24NCVC-933–05 of 2013.

Cyrus Das (David Mathews with him) (Tetuan Mathews Hun Lachimanan) for the appellant.
Gananathan Pathmanathan (Olivial Yeoh with him) (Tetuan Ganathan Loh) for the respondent.

Nalini Pathmanathan JCA:

INTRODUCTION

[1] The action, in respect of which this appeal arises, was brought by an executor and the trustees of the estate of Loh Ah Moy @ Loh Siew Keng ('the appellants'), seeking relief from personal liability in respect of certain transactions, which they had undertaken. The appellants sought to be exonerated under the provisions of the will of the late Loh Ah Moy or, alternatively, sought protection against personal liability under s 63 of the Trustees Act 1949.

[2] The High Court dismissed the appellants' application, refusing such relief on the grounds that theappellantshad not acted in accordance with the provisions and spirit of the will and could not, on a consideration of the entirety of the facts and circumstances of the case, be said to have acted honestly and reasonably.

[3] The primary issue that arose for our consideration was whether, under the circumstances of this particular case, the application of the trustees and the executor for relief ought in fact to have been entertained, or whether the application had been correctly refused. This in turn required a consideration of the construction to be afforded to s 63 of the Trustees Act 1949, more particularly in the context of the provisions of the will of Loh Ah Moy @ Loh Siew Keng, the acts and/or omissions of the trustees, and on the basis of accepted legal authorities.

[4] On 18 September 2014, after the hearing of the appeal, we determined unanimously that the appeal be allowed. Based on the evidence on affidavits before the court, we were satisfied that the appellants had acted honestly and reasonably, thereby availing the appellants of the protection afforded under s 63 of the Trustees Act 1949 Our grounds for allowing the appeal are set out below.

SALIENT BACKGROUND FACTS

[5] The salient facts, which are largely undisputed, are comprehensively set out in the judgment of the learned High Court judge as well as the submissions of parties, which we adopt.

[6] The late Loh Ah Moy @ Loh Siew Keng ('the deceased') passed away on 25 March 2001 leaving a will dated 4 March 1992. Under the terms of the will, the first appellant, Ong Soo Keok and the respondent, Ong Soo Kwee were appointed as co-executors and co-trustees of the estate. They are both sons of the deceased and are brothers. They are also beneficiaries under the will. The will was admitted into probate on 28 November 2001. The estate comprises both moveable and immoveable assets in several jurisdictions.

[7] The provisions of the will require the executors to get in and vest the properties under their names. After paying out certain legacies, the properties are then subject to a trust, which is stipulated to operate for a period of twenty years or upon the death of the respondent. Clauses 6–9 of the will are relevant and are set out below:

> *I direct that my said Executors and Trustees shall have the absolute power to sell any of my properties and the proceeds of sale derived therefrom shall be reinvested at the absolute discretion of my said Executors and Trustees without being answerable for any loss whatever. I further direct that my said Executors and Trustees shall have the absolute discretion to change or to reinvest my existing investment without being liable to any loss whatever.*
>
> *Save and except for reinvestment purposes my said Executors and Trustees shall not dispose of any of my properties.*
>
> *The rental income from my properties, dividends and returns from my investments shall be distributed every quarterly as follows: … (names of beneficiaries and apportionment set out) …*
>
> *I direct that the said arrangement under paragraph eight (8) shall continue for the next twenty (20) years from the time of my death or until the death of my son Ong Soo Kwee whichever is earlier. Upon the lapse of twenty (20) years from the time of my death or upon the death of my said son Ong Soo Kwee whichever is earlier my said Executors and Trustees shall then distribute my real and movable properties, investments and monies in the proportions as stated in paragraphs two (2) and three (3) as stipulated aforesaid.'*

[8] On 30 September 2009, the second appellant, who is the son of the first appellant, was appointed as an additional co-trustee of the estate vide an order of court. The second appellant was not appointed as a co-executor and is not a beneficiary under the will.

[9] In February 2010, the first and second appellants made proposals to optimize the returns from the will trust assets. The primary reason for this

proposal was the fact that the estate's assets were not, in their view, generating enough income for distribution to the beneficiaries, after taking into account the expenses needed to manage these assets. The proposal included a scheme to sell a piece of property belonging to the estate, known as Lot 784, which was located in the Golden Triangle of Kuala Lumpur. The proposal was circulated to all the beneficiaries including the respondent and feedback invited. It is a pertinent fact that the respondent held [bc] share of Lot 784 on trust for the estate. At this point in time, the respondent remained a co-trustee and executor. There was no adverse feedback or opposition received from any party.

[10] On 28 January 2011 the respondent was removed as a trustee and the third appellant appointed in his stead, again by way of an order of court ('removal order'). However the order did not have the effect of removing the respondent as an executor. As such the respondent remained an executor at all material times, together with the first appellant. The respondent appealed against the removal order.

[11] On 8 June 2011 the co-trustees, namely the appellants here, wrote again to the beneficiaries (including the respondent) with their proposals for the optimization of returns from the will trust assets. This included plans for Lot 784. A scheme was put forward for the development of the said lot, and alternatively, for the sale of the said lot. There were numerous other proposals in respect of other assets. The appellants, as co-trustees, specified that they were of the view that the spirit and intent of the proposal was consistent with the wishes of the deceased, and would be in the best interests of the estate and its beneficiaries. There was no adverse response from any party to these proposals.

[12] By way of an order of court dated 8 August 2011, the appellants obtained an order compelling the respondent to execute and deliver up documents pertaining to the vesting of the estate's assets ('compelling order'). More specifically, the respondent was ordered to surrender his holdings as trustee in relation to Lot 784 and to execute other documents so as to relinquish his position as trustee of the assets. The appellants maintained that they were constrained to do so by reason of the respondent's obstinacy. The respondent appealed against this order as well.

[13] In furtherance of their proposal in relation to Lot 784, the appellants in their capacity as representatives of the estate, entered into a conditional sale and purchase agreement dated 7 October 2011 with one Ace Rhythm Sdn Bhd ('the purchaser') for the sum of RM43,123,200 (Ringgit forty three million, one hundred and twenty three thousand and two hundred only). This price exceeded the valuation price for Lot 784 of RM29m (Ringgit twenty nine million) obtained in April 2011.

[14] The sale was conditional upon the procument of an order of court sanctioning such sale. The appellants then obtained an ex parte order dated 24 October 2011 to sanction the sale of Lot 784 to the purchaser. The purchaser paid a sum of RM4,312,320 (Ringgit four million, three hundred and twelve thousand, three hundred and twenty) by way of deposit. A sum of RM685,658.88 (Ringgit six hundred and eighty-five thousand, six hundred and fifty eight and eighty eight sen) was paid to the estate agent Eastern Century Realtorsby way of commission.

[15] Pending the completion of the sale, the respondent applied to set aside the ex parte sanction order.

[16] On 10 February 2012, the respondent succeeded in his appeals to the Court of Appeal against the removal and compelling orders. The nett effect was that he was reinstated as co-trustee of the estate. The third appellant then ceased to be a co-trustee. (At this juncture the respondent's application in the High Court to set aside the order sanctioning the sale of Lot 784 was still pending).

[17] This court, in its broad grounds in reversing the removal and compelling orders, held, inter alia, that:

(a) the contention of the respondents in that appeal to the effect that executorship of the estate had 'come to an end' or was dormant, was incorrect. It was held that executorship would not end until 2020 in accordance with the terms of the will;

(b) the stated intention of the testator as set out in cl 9 is for continued investment with winding up or distribution after 2020. This lent further support to the conclusion that executorship could not have been dormant. The respondent therefore could not carry out his duties as executor without being a trustee;

(c) the scheme proposed was for the distribution of the estate and the respondent had not been in gross dereliction of duty in failing to respond to the scheme. The respondent had not participated for good reason, namely so as not to breach the will or to act contrary to the directions of the will; and

(d) the removal and compelling orders were wrongfully applied for and granted.

[18] Next, on 7 June 2012, the respondent succeeded in his application to set aside the ex parte sanction order obtained by the appellants in relation to the sale of Lot 784.The appeal to the Court of Appeal against this order was

dismissed on 21 September 2011 and the application for leave to appeal to the Federal Court was withdrawn on 18 March 2013.

[19] As a result of the setting aside of the order sanctioning the sale of Lot 784, the sale had to be aborted. The appellants were obliged to uncouple the sale and refund the deposit of 10% that had been paid by the purchaser. There were also costs and expenses incurred in relation to legal fees for conveyancing and in relation to the eviction of the tenant who had had been in occupation of Lot 784. In this latter context, the appellants had taken steps to terminate the tenancy over Lot 784 and to evict the tenant. As a consequence of the setting aside, litigation ensued in connection with the termination. The tenant also sought damages in the sum of RM6m (Ringgit six million) by way of a counterclaim.

[20] The respondent took the position that the appellants were personally liable for, and ought therefore to bear the consequences arising from the aborted sale as well as the litigation relating to the tenant. The appellants then took out an originating summons in the High Court seeking protection or relief from personal indemnity under cl 6 of the will and s 63 of the Trustees Act 1949.

THE DECISION OF THE HIGH COURT

[21] The learned High Court judge found, inter alia, as follows:

(a) while the appellants under cl 6 of the will were to have absolute power and to exercise absolute discretion in relation to the sale of the estate's assets, they were constrained to act in accordance with the other provisions of the will, namely cll 7, 8 and 9. As such cl 6 had to be read together with cll 7, 8 and 9;

(b) since the Court of Appeal had held that the sale by the appellants went against the provisions and spirit of the will, it therefore followed that the appellants' absolute power and absolute discretion had not been exercised in accordance with the provisions and spirit of the will. This therefore disentitled the appellants from any protection or exoneration under the will. The learned judge therefore refused any relief under cl 6 of the will;

(c) with regard to s 63 of the Trustees Act 1949, the appellants had to show the court that they had acted 'honestly and reasonably' in order to qualify for protection. The learned judge concluded that s 63 of the Trustees Act 1949 envisaged the application of an objective, rather than a subjective test; and

(d) the learned judge considered, in the context of the will, and the orders of the respective courts as to the will, as well as substantive legal authority, that s 63 did not avail itself to the appellants for '… *they could not be said to have acted honestly and reasonably, having firstly been found to have not acted in accordance with the provisions and spirit of the will and secondly having regard to the other facts and circumstances and the cited authorities*'.

THE HEARING IN THE COURT OF APPEAL

The appellants' submissions

[22] Learned counsel for the appellants, Dato' Cyrus Das submitted that the learned judge had erred in concluding that he was constrained to rule in a manner which was consistent with the thinking and decision of the Court of Appeal. The learned judge had stated in his grounds that this court had already made a finding that the sale of Lot 784 went against the provisions and spirit of the will. This was in fact not entirely accurate as the subject matter of that appeal was in relation to the order removing the respondent as a co-trustee. It was in that context that it was held by this court that 'the orders were wrongfully applied for and granted'. At that juncture this court was not adjudicating on proceedings to impugn the sale of Lot 784. The application by the respondent to set aside the ex parte sanction order was still pending. As such, it was submitted that reliance placed on the broad grounds of this court which was dealing with the removal of the respondent as a trustee, was erroneous.

[23] The second line of submission sought to challenge the finding of the learned judge that the object of the sale was for the distribution of the proceeds, rather than reinvestment as mandated under the will. It was submitted that this conclusion was factually incorrect as it was at all times the stated intention to reinvest the proceeds as envisaged under cl 6, for the purposes of improving the income derived from the estate. Reference was made to the proposals circulated by the first and second appellants to all the beneficiaries in February 2010 where it is clearly set out that the proceeds of the sale of Lot 784 were to be invested in a fixed deposit or other safe investments. The memorandum circulated in October 2011, where the appellants envisaged that the net proceeds of sale of Lot 784, when reinvested into a fixed deposit, would enable the trustees to start paying a regular income to the beneficiaries, further corroborates this. As such it was submitted that the appellants had acted 'reasonably' in trying to maximise the income available to the beneficiaries.

[24] Thirdly, it was submitted that the wrong test had been applied in relation to s 63 of the Trustees Act 1949. It was neither an objective test, as stated by the learned judge, nor a subjective test, but was simply a question of

whether the trustees had acted 'reasonably' within the factual matrix and circumstances of a particular case.

[25] A fourth contention was that the learned judge had misconstrued s 63 of the Trustees Act 1949 in concluding that the appellantswere not entitled to protection because they had not acted in accordance with the provisions and spirit of the will. In this context, it was submitted that there had been a failure to appreciate that the exoneration afforded by the section was available to trustees who had made an honest mistake and acted reasonably, which was the case here. It was pointed out that the appellants were lay trustees, who had not attempted to personally benefit or profit, from the sale. The proposed sale had been in the interests of the estate and the beneficiaries as a whole, and had been supported by all the beneficiaries, save for the respondent who had remained hostile. It was impressed upon us that there was no assertion or finding of dishonesty either in the order setting aside the sanction for the sale or the subsequent appeal. The appellants, it was submitted, had at all times acted with full disclosure and communication of the proposals and updates relating to the sale as well as the subsequent termination and ensuing litigation in relation to the tenant. In relation to the proposed sale, it was pointed out that the appellants had acted properly and prudently by obtaining professional valuation, which was circulated in advance. The proposed purchase price was considerably higher than the valuation price. The sale was, moreover, conditional upon sanction from the court, which had been procured (prior to being set aside). Taken in its entirety therefore, the submission was made that the appellants had acted honestly and reasonably. Given this factual matrix, none of the other beneficiaries, save for the respondent, sought to hold the appellants personally liable for the costs and expenses arising from the aborted sale and ensuing litigation.

[26] It was evident from the line of submissions adopted that the appellants were essentially relying on s 63 of the Trustees Act 1949 to obtain relief, rather than cl6 of the will.

[27] Extensive submissions were made on the case law relating to s 63 of the Trustees Act 1949 as well as case law from the United Kingdom in relation to the equivalent of s 63 in that jurisdiction, which will be considered below.

THE RESPONDENT'S SUBMISSIONS

[28] Learned counsel for the respondent, Mr Gananathan Pathmanathan, dealt initially with the proposed indemnity which the appellants sought to procure under the terms of the will, more particularly cl 6. As that was not the thrust of the appeal, learned counsel's submissions on this point are not reproduced here in full. Suffice to say that it was submitted that it was

incumbent upon the appellants to demonstrate that they had not acted in contravention of the terms of the will. It was submitted that it was clear from cl 6 of the will that any sale of the property was to be carried out by the executors and trustees collectively. By seeking to dispose of Lot 784 without the concurrence and agreement of the respondent, and in his absence as executor of the estate, it was submitted that the appellants had in fact contravened the specific letter and spirit of cl 6.

[29] The respondent further submitted that in embarking on this course of action to effect a sale of Lot 784, the appellants had effectively been dishonest in that they had sought to misinform and misrepresent to the purchaser and the world at large that they were the sole executor and trustees of the estate in the proposed sale. In support of this contention it was submitted that the appellants had removed the respondent from the document of title as 'executor', and that the second and third appellants had registered themselves as 'executors' when they were not so appointed. In this context it was submitted that the true motive of the appellants in seeking to dispose of Lot 784 was to liquidate the estate's assets in contravention of the spirit and intention of the will. Such an attempt at liquidation had commenced from as early as 2003 with the concurrence of the first appellant and had been revived in 2010 and 2011.

[30] Reliance was also placed on the broad grounds of this court to buttress the submission that the sale of Lot 784 amounted to a distribution of the estate, which was against the testator's wishes.

[31] In so far as the 'best interests of the beneficiaries' was concerned, the respondent submitted that as the respondent himself was a beneficiary, and he did not approve of the sale, it could not be said that the appellants had acted in the interests of all the beneficiaries. It was further contended that the interests of the beneficiaries had to be tested against the dictates of the will. The intention of the testator overrode any interest the beneficiaries had unless all of the beneficiaries decided otherwise, which was not the case here.

[32] With regards to s 63 of the Trustees Act 1949, learned counsel for the respondent maintained, as did the High Court, that it was incumbent upon the appellants to demonstrate that they had acted honestly and reasonably. The test, it was maintained, was an objective test. Learned counsel maintained that in applying s 63 of the Act three possible scenarios arose:

(a) if the trustees were found not to be honest, then no relief was available under s 63 of the Trustees Act 1949;

(b) if the trustees were honest but had not acted reasonably, then also no relief would be available; and

(c) if the trustees had acted both honestly and reasonably, this court would still have to consider whether they ought to be fairly excused for the breach.

Case law was discussed in support of these propositions.

[33] Ultimately the thrust of learned counsel's submissions was that the appellants were 'far from being honest' in that they had misrepresented to the court and third parties that they were the appointed executors. They had moreover, it was said, perpetrated these acts notwithstanding their full knowledge of the contents of the will.

[34] Learned counsel went on to submit that the chain of events prior to, and leading up to the aborted sale of Lot 784, demonstrated that the appellants were not honest. Reference was made to the title deed for Lot 784, and it was submitted that this document evidenced the fact that the appellants held themselves out as executors, when they were not in fact so. The appellants' lack of honesty was also evident from the fact that they were intent on 'pushing through' the sale of Lot 784 by removing the respondent as a trustee, and failing to acknowledge his role as co-executor.

[35] Reliance was placed on the decision of this court in relation to the removal appeal to maintain that the appellants had deliberately failed to follow the intention of the testator. The motive behind this course of action was to enable a liquidation and distribution of the estate, contrary to the spirit of the will. In summary it was maintained that based on the earlier judgment of this court and the conduct of the appellants, their conduct was unequivocally dishonest. On the question of 'honesty' and dishonesty' reliance was placed on *Royal Brunei Airlines v Tan Kok Ming Philip* [1995] 3 MLJ 74. In view of the lack of honesty it was asserted that there was no necessity to further enquire whether the appellants had acted reasonably, as the appellants could not avail themselves of the protection afforded by statute.

[36] On the issue of 'reasonableness' it was submitted that the appellants had placed the estate at risk by representing to the purchaser that they were the executors of the estate when in fact they were not. The respondent disputed the contention that the property was for reinvestment, maintaining that the learned judge had correctly concluded that it was for distribution instead. Put simply, it was maintained that as the appellants had not complied with the provisions of the will, they were not entitled to any protection.

THE APPELLANTS' REPLY SUBMISSION

[37] By way of reply to these assertions of dishonesty, learned counsel for the appellant submitted that these allegations of 'dishonesty' had not been

specified nor stated in any of the four affidavits by the respondent in relation to the setting aside of the sanction for sale. Reference was made to the terms of the sale and purchase agreement for the aborted sale where the phrase 'for the time being' was used in describing the vendor. The appellants had genuinely believed prior to the judgment of this court in February 2012 that they could make a distinction between executors and trustees, and it was on this basis that the title was amended.

[38] It was further submitted that the appointment of the second and third appellants, as well as the removal of the respondent as co-trustee, not to mention the sanction for the sale of Lot 784 were all done pursuant to orders of court. In other words, the appellants were at all times acting under an order of court. In these circumstances, it was submitted that it was wrong to say that they had acted with stealth or covertly. In relation to the issue of distribution versus reinvestment, it was submitted that the respondent had effectively acknowledged that there was to be a reinvestment when he sought to set aside the sanction for the sale of Lot 784. There was no complaint of covert conduct at that juncture, far less of dishonesty.

[39] It is apparent from the submissions that the primary issue for consideration by this court is the application of s 63 of the Trustees Act 1963, more particularly whether the section affords the appellants any protection on the particular matrix of facts relating to this case.

DECISION OF THIS COURT

[40] Having heard counsel and having considered the matter in its entirety, we were unable, with respect, to agree with the conclusion reached by the learned High Court judge. We concluded unanimously, that on the evidence before the court, the appellants had satisfied the burden imposed by s 63 of the Trustees Act 1949. They had acted honestly and reasonably, in that they sought directions from, and acted pursuant to orders of court. As such, we were of the view that the impugned acts were not acts that were carried out covertly or with stealth. We further found no elements of dishonesty in their conduct. In fact, what they did was in the interests of the estate and its beneficiaries, although it went against the spirit of the will. Accordingly, we allowed the appeal and set aside the orders of the learned High Court judge. We allowed the prayers sought for in the application filed by the appellants for relief under s 63 of the Trustees Act 1949. Parties were directed to draft an order, which dealt with all consequential matters, including the issue of costs. On the adjourned date, after adjudication on the issue of costs, a consent order was entered on terms as agreed between the parties as a consequence of our decision on 18 September 2014.

A THE LAW

Section 63 of the trustees act 1949 – does the section require the application of either an objective or subjective test?

B **[41]** Section 63 of the Trustees Act 1949 provides as follows:

> *If it appears to the court that a trustee*, whether appointed by the court or otherwise, *is or may be personally liable for any breach of trust*, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, *but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust* and for omitting to obtain the directions of the court in the matter in which he committed such breach,*then the court may relieve him either wholly or partly from personal liability for the same*. (Emphasis added.)

C

D **[42]** The provisions of our Trustees Act 1949 are in pari materia with s 61 of the English Trustee Act 1925 (the predecessor of which is the Judicial Trustees Act 1896, s 3). *Lewin on Trusts* (18th Ed, Thomson Sweet & Maxwell 2008) at paras 139–140 (p 1615) explains the section as follows:

> *The section confers upon the court a judicial discretion and it is not possible to lay down rules as to the mode in which the court will exercise it: each case must be governed by its own circumstances. ...*

E

[43] Underhill and Hayton in their text entitled *Law Relating to Trusts and Trustees* by David J Hayton (15th Ed, Butterworths London 1995) in Chap 21 (at p 881), article 98 states:

F

> ... The onus of proving honesty and reasonableness and that he ought fairly to be excused is cast upon the trustee, *and whether a trustee acted reasonably and honestly is a question of fact depending on the circumstances of each case, no general principle or rule being possible* (Emphasis added.)

G

[44] The premise that the application of s 63 of the Trustees Act 1949 requires a consideration of whether a trustee acted honestly and reasonably on the particular facts and circumstances of a case is borne out by the case of *Ch'ng Joo Tuan Neoh (F) and Khoo Ee Lay (substituted by Order of Court dated 29-2-32) v Khoo Tek Keong & Others* [1932] 1 MLJ 141 where the Court of Appeal, when considering whether the trustee was entitled to relief under s 60 of the Trustees Ordinance 1929 (the predecessor to the current Act), held:

H

> ... What the court has to consider is first whether the trustee acted honestly, secondly whether he acted reasonably; and thirdly ought he fairly to be excused ...

I

[45] And in *Re Haji Ali bin Haji Mohamed Noor Deceased Habsah binte Ngasirah (W) & Anor v Mohamed Zain bin Haji Ali & Ors* [1933] 2 MLJ 135, where similarly, the court had to consider whether to exonerate a co-trustee

under the same s 60 of the Trustees Ordinance 1929, it was held that the onus was upon the trustee to satisfy the court on three points, namely, that she acted honestly, reasonably and that she ought fairly to be excused. The court then went on to consider the circumstances of the particular case to determine whether these three limbs had been satisfied. A reading of this case suggests that there was no question of the application of either a subjective or objective test. The section requires the court to be satisfied of the matters set out, namely honesty and reasonableness and that given the same, whether the trustee ought fairly to be excused.

[46] It is clear from the foregoing that the grant or withholding of relief under s 63 is entirely a matter of judicial discretion, which discretion is to be exercised after full consideration has been accorded to whether a trustee acted both honestly and reasonably, within the context or factual matrix of each individual case. The court then has to assess whether the trustee ought fairly to be excused. No general principle or rule, far less, a subjective or objective test, comprises a part of the exercise of such judicial discretion. To this extent therefore, it would appear that each case is governed by its own particular circumstances and no subjective or objective test ought to be imposed upon the court by way of a rule, in the exercise of the judicial discretion accorded by that section. For these reasons we would respectfully disagree with the conclusion of the learned judge that an objective test should be utilised in applying s 63 of the Trustees Act 1949.

How is section 63 of the Trustees Act 1949 to be construed?

[47] The language of s 63 of the Trustees Act 1949 is wide, and accordingly, it ought not to be construed narrowly. In *Re Allsop; Whittaker v Bamford* [1914] 1 Ch 1 the trustees, acting upon erroneous advice from their solicitor as to the effect of the will, paid income to persons not entitled to receive the same. In an action by the testatrix's sole next of kin to recover the monies wrongly paid out, together with interest and accumulations which ought to have been made, the trustees sought, inter alia, relief under s 3 of the then Judicial Trustees Act of 1896 (which, as explained above, is the predecessor to the present English provision which is identical to s 63 of the Trustees Act 1949 our). The English Court of Appeal held that the application of the section was not confined to cases where a breach of trust arises from some executive or administrative blunder, but may extend to cases where money is paid to a person not entitled according to the true construction of the instrument; that on the facts of that case the trustees could not be said to have acted 'unreasonably' merely because they had, under legal advice, taken a wrong view of the construction of the will, and, there being no question as to their having acted 'honestly' they 'ought fairly to be excused for the breach of trust' and were entitled under s 3 to be relieved from personal liability. In construing s 3 the court held as follows:

> The language of s 3 is wide, and a narrow construction ought not be placed on it. It was intended to give power to the Court to relieve an honest trustee in proper cases. The words 'is or may be liable' appear to point to doubtful questions of construction. In my opinion the case of a trustee committing a breach of trust by paying the wrong person in consequence of acting upon an erroneous construction is within the section, and the Court has jurisdiction to relieve against the personal liability.

This viewpoint was endorsed in *In re Grindey Clews v Grindey* [1898] 2 Ch 593.

[48] Similarly therefore, our s 63 of the Trustees Act 1949, which is on substantially similar terms, ought not to be construed narrowly. It should, as expressly provided for, serve to relieve an honest trustee in a proper case.

The factual allegations against the appellants and our conclusions

The appellants holding themselves out as 'executors'

[49] As stated earlier, the thrust of the respondent's case was that the appellants had acted covertly and with stealth thereby failing to satisfy the condition precedent in s 63 of the Trustees Act 1949 that they had acted honestly. In support of this contention it was submitted for the respondent that the appellants had dishonestly held themselves out to be 'executors' of the estate in the course of executing documents in relation to the title documents pertaining to Lot 784 and/or by registering themselves as the 'executors' on the title deed, when they were not so appointed.

[50] A perusal of a copy of the title deed discloses that only the names of the appellants appear, with the first appellant described as holding a half share in his own name and a further half-share in his capacity as an executor of the estate. The reference therefore is to a single 'executor' (rather than 'executors') next to the name of the first appellant, which is consonant with his role as one of the executors. There is no specific description in relation to the second and third appellants, who were at the material time, co-trustees. The second and third appellants have not been specifically held out to be 'executors' on the trust deed. The fact that the term 'executor' rather than 'executors' has been specified next to the name of the first appellant supports the position that the second and third appellants have not sought to hold themselves out as executors as well. It is also relevant that the appellants had, prior to the judgment of the court in February 2012, believed that a distinction could be made between executors and trustees and it was on the basis that the title was amended. They had moreover, at all material times, acted on legal advice. The description cannot therefore be said to be inaccurate or dishonest.

[51] A similar allegation is also made in relation to the conditional sale and purchase agreement that the appellants entered into with Ace Rhythm. A perusal of the same indicates that the appellants are described as 'the executors and/or trustees for the time being of the estate'. The qualification to the description afforded by the term 'and/or trustees' as well as the phrase 'for the time being' both, in our view, detract from any connotation of dishonesty or any attempt to mislead either the purchaser or the world at large.

The purpose of the proposed sale of Lot 784 – reinvestment or liquidation?

[52] A separate issue was the purpose of the proposed sale of Lot 784. In this context we concur with learned counsel for the appellant that the factual matrix of the case clearly establishes, more particularly through the memorandum dated February 2010 and October 2011, that the ultimate purpose of the sale was to reinvest the proceeds derived from the sale, rather than to distribute the same. This issue too therefore does not lend support to the respondent's contention that the trustees acted dishonestly.

[53] It bears repeating here that the broad grounds handed down by this court on 10 February 2010 did not relate directly to the setting aside of the conditional sale which was still pending, but to the removal and compelling orders and in that context, a construction of the will. As such the issue of whether the proceeds of sale were to be reinvested or distributed was not an issue directly before the court at that juncture.

Other material facts relevant to the issue of 'acting honestly'

[54] More significantly, on a consideration of the entirety of the circumstances and facts, it is untenable to conclude that the appellants as trustees acted dishonestly because:

(a) their conduct as evidenced by the chronology of events suggests that they acted in a representative capacity as personal representatives of the estate;

(b) there was no attempt on the part of the appellants to personally benefit or profit from the sale and purchase of Lot 784;

(c) the proposed scheme for the sale of Lot 784 was undertaken in the genuine belief that it was in the interests of the estate and the beneficiaries as a whole;

(d) the scheme was supported by all the beneficiaries save for the respondent;

(e) in the course of the setting aside application, there was no finding of dishonesty;

(f) there was no finding of dishonesty by this court in its earlier decision in reversing the removal and compelling orders;

(g) the appellants acted at all times under, and pursuant to orders of court. In this regard there was no question of their acting with stealth or covertness;

(h) the appellants, in seeking to sell Lot 784 acted with honesty and prudence in procuring a professional valuation well in advance of the proposed sale, and subsequently procuring a purchase price far above the valuation price. In this context the sale price was some RM14m higher than the valuation price;

(i) at all material times the appellants were represented by solicitors and sought legal advice prior to undertaking any steps. They did so through solicitors who had managed the affairs of the estate and were well conversant with the same over a period of eleven years;

(j) the appellants here are lay persons as opposed to professional trustees.

(k) the proposed sale of Lot 784 was conditional upon sanction from the court which was duly obtained; and

(l) there was no express objection on the part of the respondent, notwithstanding the several proposals circulated by the appellants.

[55] A consideration of all these matters, within the factual framework of this case persuaded us that the appellants acted honestly.

[56] We also concur with learned counsel for the appellants that if the respondent was intent on denying relief to the appellants on the grounds that they had been dishonest, there ought to have been a clear statement or imputation to that effect by way of affidavit from the outset (see *Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 174 (CA) for the proposition that 'dishonesty' against a party must be specifically pleaded. See also *Perrins v Bellamy* [1898] 2 Ch 521 at p 527). Here there was no clear assertion or finding of dishonesty either in the setting aside application or the appeal emanating from it.

[57] The question of whether the appellants had acted 'honestly' or 'dishonestly' and the appropriate standard or test to be applied in determining this issue are more properly relevant to the preceding application to set aside the sanction of the court procured for the proposed sale of the said property. This is because the issue of whether the proposed sale amounted to a breach of trust, and the nature of such breach, namely whether it involved elements of 'dishonesty' or 'mala fides', ought properly to have been dealt with at that

juncture. This would have had the effect of classifying the breach as either a 'technical' breach of trust, or one premised on 'negligence' or 'dishonesty'.

[58] However the issue of 'dishonesty' was not canvassed to any considerable extent during the hearing of the setting aside application. The breach of trust arising from the aborted sale of Lot 794 was not characterised as 'dishonest'. It was held not to be in accordance with the spirit of the will. This in itself does not amount, per se, to 'dishonesty'. Therefore in considering whether to afford the trustees protection under s 63 of the Trustees Act 1949, it is their conduct or omission in relation to the breach of trust that is relevant. If it was not characterised as 'dishonest' then it follows that 'dishonesty' ought not to be alleged against them at this juncture, as the characterisation of the breach was properly the subject matter of the preceding application. It therefore also follows that it is unnecessary to consider the appropriate standard or test to be applied in relation to assessing 'dishonesty'.

'*Acting reasonably*'

[59] The second limb that has to be satisfied in determining whether protection is available under s 63 of the Trustees Act 1949 is that the trustees ie the appellants ought to have acted 'reasonably'. The phrase 'acting reasonably' means acting reasonably as trustees. Therefore the issue that arises for consideration is whether the appellants, in undertaking the proposed sale of Lot 784, acted reasonably in their capacity as trustees.

[60] While case-law and the determination in each case must depend upon its own particular facts, a consideration of some case-law affords insight and guidance as to the manner in which the section has been applied over the years. For example in *Perrins v Bellamy* the English Court of Appeal held that the trustees had committed a breach of trust by misconstruing the settlement as conferring a valid power of sale when none, in fact, existed. Notwithstanding this, relief from liability was accorded on the basis that in the circumstances of the case it was a 'judicious breach'.

[61] In *Re Allsop* has been referred to earlier. It was a case where the English Court of Appeal granted relief under their equivalent provisions where the trustees misconstrued a provision of the will. That bears some similarity to the present case where the appellants here misconstrued the effect of cl 6 of the will, having obtained legal advice and directions from the court. And in *In re Kay Mosley v Kay* [1897] 2 Ch 518, the trustees were afforded relief by the English Court of Appeal where they had paid out sums prior to ascertaining the solvency of the estate, on the reasonable and honest belief that the estate was solvent. The monies had been paid out to meet immediate exigencies of the deceased's family.

[62] In *Re Evans (deceased); Evans v Westcombe* [1999] 2 All ER 777, the High Court in England granted partial relief to trustees under s 61 of their Trustees Act 1925 which is in pari materia with our s 63, where the personal representative had failed to account for interest for the period after the claimant became entitled to his share in a missing beneficiary policy purchased by the personal representative. In awarding such partial relief the court took into account the fact that there was no allegation of dishonesty, the personal representative was an unpaid lay person and was willing to act in accordance with professional advice so as to discharge her responsibilities. As such, it was held that the personal representative ought to be granted relief for a technical breach.

[63] And in *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1998] SGCA 35 the Singapore Court of Appeal granted relief to the trustees pursuant to s 63 of their Trustees Act 1985 (Singapore) on the basis that they had acted both reasonably and honestly in executing a share swap. In so deciding the court considered the following factors:

(a) the act was carried under professional advice;

(b) the act was carried out with the consent of all relevant parties; and

(c) the act was carried out with the good intention of benefitting all the beneficiaries of the settlement.

[64] Taking into consideration the relevant factors set out in para 54 above, which are of equal relevance in this context, and applying the same, we are of the view that the appellants did indeed act reasonably. We would, with respect, disagree with the learned judge in respect of his finding that the appellants did not.

Ought the appellants 'fairly to be excused for the breach of trust'?

[65] As we have concluded that the twin limbs of honesty and reasonableness have been satisfied, it follows sine qua non that the third limb is also satisfied. This aspect of the section requires a consideration of whether in all the circumstances of the case the trustees may be indemnified either wholly or partially for their breach. While a reading of the section requires a three stage consideration, ultimately it is again a consideration of the entirety of the circumstances and the acts or omissions of the trustees in the context of the circumstances that determines the answer to this limb. In the instant case, the trustees have been found to have acted in breach of the terms of the will, more particularly cl 6 read together with 7, 8 and 9. However the facts and circumstances surrounding the breach are such that it is evident that in undertaking the proposed sale of Lot 784, the trustees were not actuated by dishonesty, mala fides, or with any wrongful intent to profiteer personally. The

factual matrix of this case demonstrates that they genuinely believed that their acts, which were premised on legal advice and supported by court orders, were for the ultimate benefit of all the beneficiaries. The purpose of the proposed sale, as shown expressly in several documents referred to above, was to reinvest the proceeds of such sale. All the beneficiaries save for the respondent acceded to and supported the proposed sale. While it may be said from the view point of the respondent that the appellants acted with relative haste,and failed to procure the respondent's consent as an executor, the setting aside of the removal and compelling orders as well as the setting aside of the proposed sale has met these concerns and vindicated the respondent. The present application was concerned primarily with whether the conduct of the trustees fell within the ambit of s 63 of the Trustees Act 1949 so as to afford them an indemnity for their acts and/or omissions. In our view, the appellants in the instant case met the threshold requirements, and ought in the entirety of the circumstances, fairly to be excused for their breach of trust.

[66] The appeal is therefore allowed. The orders of the learned High Court judge are therefore set aside. The prayers sought for in the application filed by the appellants for relief under s 63 of the Trustees Act 1949 are allowed. A consent order in relation to consequential orders and costs was entered on terms both as adjudicated upon by this court and as agreed between the parties as a consequence of the decision handed down on 18 September 2014.

Appeal allowed.

Reported by Afiq Mohamad Noor